NOTE: The following is a draft response to a request for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.

TO: Board Members

FROM: Brian J. O'Dowd, Assistant General Counsel

RE: Request for Advisory Opinion No. 4850

DATE: August 15, 2007

INTRODUCTION

The Citizen's Ethics Advisory Board issues this advisory opinion at the request of Attorney Scott L. Murphy, who asks, on behalf of Connecticut Innovations, Inc. (CI), how the revolving-door provisions of the Code of Ethics for Public Officials (Code) apply to designees of ex-officio members of the CI Board of Directors (Board).

RELEVANT FACTS

The following facts are relevant to this opinion. CI, a quasi-public agency, exists under General Statutes § 32-35, which provides for a fifteen-member Board: eight appointed by the Governor, four by legislative leaders, with the remaining three serving ex officio (that is, by virtue of an office or position they hold). The ex-officio members, vested with the same powers and privileges as other Board members, include the Commissioner of Economic and Community Development, the Commissioner of Higher Education, and the Secretary of the Office of Policy and Management, each of whom may appoint a designee to represent him or her at Board meetings with "full power to act and vote in his [or her] behalf." General Statutes § 32-35 (b).

As CI's governing body, the Board is vested with the "powers of the corporation"[1]; General Statutes § 32-37; and is responsible for appointing and setting the salary of an executive director (which now stands at $175,000). General Statutes § 32-38. The sole limitation on its appointment authority, under § 32-38, is that the appointee not be a Board member.

QUESTIONS

Attorney Murphy asks two questions:

[1]The "powers of the corporation" are listed in General Statutes § 32-39 (1) through (38).

1. Whether a designee of an ex-officio Board member is deemed to be a "public official" of CI for purposes of General Statutes § 1-84b (b); and if so,

2. Whether, under an exception to § 1-84b (b), the designee may be employed by CI as its executive director within the one-year period set forth in that provision, provided that the pay level is no greater than the individual was receiving at his or her employing state agency.

ANALYSIS

The provision relevant to the questions posed is § 1-84b (b), one of the Code's revolving-door provisions, which limit the activities of former executive branch or quasi-public agency public officials or state employees. Section 1-84b (b) provides, in relevant part, as follows:

> No former executive branch or quasi-public agency public official or state employee shall, for one year after leaving state service, represent anyone, other than the state, for compensation before the department, agency, board, commission, council or office in which he served at the time of his termination of service, concerning any matter in which the state has a substantial interest. . . .

The purpose of this provision is to establish a cooling-off period in order to prevent individuals "from using contacts and influence gained during State service to obtain improper advantage in their subsequent compensated dealings with their former agency." Advisory Opinion No. 87-14. "Whether . . . the matter involved is one with which the individual had contact as a public employee is irrelevant . . . [for] [t]he undue influence guarded against is that which results from mere association with the former agency." Advisory Opinion No. 86-11. Indeed, "this undue influence may be strongest where informal communications between the agency and the former agency employee are concerned since no official records of the contact will be kept." Id.

I

With the provision's purpose in mind, we turn to Attorney Murphy's first question, namely, whether a designee of an ex-officio Board member is deemed to be a "public official" of CI for purposes of § 1-84b (b). He asserts that a designee is not and sets forth two supporting arguments: first, a designee does not fit within the Code's definition of a "public official," in that a designee is not appointed and serves only as the "designated staff representative" of an ex-officio member; and second, for purposes of § 1-84b (b), "the designee's employing state office or agency, and not CI, is the agency in which the designee served . . . ."

A designee is a "state employee" by virtue of the individual's position at his or her employing state agency and, as such, is subject to the Code regardless of his or her

designee status. As a state employee, he or she "may have more than one 'former agency' for purposes of applying the one-year ban on appearing before one's 'former department, agency, board, commission, council or office' found in . . . § 1-84b (b)." Advisory Opinion No. 2004-16. Thus, the pertinent question is not whether a designee of an ex-officio Board member is deemed to be a public official of CI, but whether—in addition to a designee's employing state agency—CI would constitute a "former agency" of the designee for purposes of § 1-84b (b). See Advisory Opinion No. 2006-2. The answer to that question depends on whether CI is an agency in which he or she "served" at the time of termination of state service. See id. (stating that the University of Connecticut is a "former agency" of the Governor for purposes of § 1-84b (b) if, upon leaving state service, the Governor is considered to have "served" in the University).

The question of "service" in more than one state entity was first addressed in Advisory Opinion No. 86-11. There, the former State Ethics Commission (former Commission) was asked whether an assistant attorney general who provided legal advice and representation to the Department of Consumer Protection (his client agency) "served" in that department under § 1-84b (b). It concluded that he did not "serve in," but rather had an attorney/client relationship with, the Department of Consumer Protection. That conclusion, it believed, although consistent with the plain language of § 1-84b (b), was at variance with the cooling-off rationale underlying that provision. A senior member of the Office of the Attorney General, it noted, would have acquired "friendships and IOUs" in both the Office of the Attorney General, in which he "served," and his client agency, with which he had an attorney/client relationship. Until § 1-84b (b) was amended, however, the former Commission felt constrained to "interpret the language which [was] enacted, whatever the legislature intended."

Twenty years later, in Advisory Opinion No. 2006-2, the Citizen's Ethics Advisory Board (Advisory Board) revisited the issue of "service" in more than one state entity, addressing the following question: whether a Governor is considered to have "served" in the University of Connecticut (University) by virtue of his or her role as ex-officio president of its Board of Trustees. The Advisory Board stated that a Governor, like the assistant attorney general in relation to his client agency, would likely have acquired "friendships and IOUs" in the University. "But unlike the assistant attorney general," it noted, "whose relationship with the Department of Consumer Protection essentially was that of outside counsel, a Governor, as ex-officio president of the board, holds a position on the University's primary policy-making authority . . . ." And in that position, it stated, "he or she has exactly the same rights and privileges as do all other Board members, including the right to vote on matters that impact practically every aspect of university life." Based on those facts, the Advisory Board concluded that, upon leaving state service, a Governor is considered to have "served" in the University for purposes of § 1-84b (b).

The facts at hand warrant a similar conclusion. As representatives of ex-officio Board members, designees sit on CI's governing authority, which is endowed with the myriad "powers of the corporation," and in so doing, are vested with "full power to act and vote" on behalf of such ex-officio members, each of whom has "all the powers and

privileges" of any other Board member. Further, the harm sought to be curbed under § 1-84b (b)—undue influence resulting from one's "mere association" with the former agency—exists regardless of whether the individual is a direct ex-officio appointment or a designee thereof. This is particularly true where a designee sits on the CI Board for any extended period of time, thereby likely acquiring "friendships and IOUs" in the quasi-public agency. Accordingly, we conclude that long-standing designees of ex-officio members of the CI Board will be considered to have "served" in the quasi-public agency for purposes of applying the one-year ban in § 1-84b (b).

Attorney Murphy argues, in the alternative, that the Code's revolving-door provisions do not apply in this particular context and, in support, cites to CI's enabling legislation, which provides, in § 32-38, as follows: "The board shall appoint an executive director of the corporation *who shall not be a member of the board* and who shall serve at the pleasure of the board and shall receive such compensation as shall be determined by the board." (Emphasis added.) That prohibition, he contends, could have been, but was not, extended to include former board members, the implication being that the legislature did not intend a revolving-door component in this specific context.

The former Commission "in very few instances . . . construed a state statute as creating a legislative exemption to a provision of the Code . . . ." Advisory Opinion No. 89-25 (Amended), citing Advisory Opinion No. 80-20 ("[w]hen the General Assembly provides for the appointment to a board or commission of someone in a position such that there is an inherent conflict of interests, it in effect grants that person a waiver of certain conflict of interest provisions of the Code"). When it did so, the "exemptions were specific and unambiguous." Advisory Opinion No. 89-25 (Amended). Section 32-38 is neither specific nor unambiguous.

In contrast, General Statutes § 32-35 (e), another provision in CI's enabling legislation, represents an exemption that is both specific and unambiguous. Section 32-35 (e) provides:

> *Notwithstanding the provisions of any other law to the contrary,* it shall not constitute a conflict of interest for a trustee, director, partner or officer of any person, firm or corporation, or any individual having a financial interest in a person, firm or corporation, to serve as a member of the board of directors of Connecticut Innovations, Incorporated, provided such trustee, director, partner, officer or individual shall abstain from deliberation, action or vote by Connecticut Innovations, Incorporated in specific respect to such person, firm or corporation.

(Emphasis added.) Section 32-35 (e) specifically and unambiguously exempts members of its Board from certain conflict-of-interests provisions in the Code—but not from any of its revolving-door provisions. Because neither § 32-35 (e), § 32-38, nor any other provision in CI's enabling legislation does so, we conclude that the revolving-door provisions of the Code are, in fact, applicable in this particular context.

II

We now turn to Attorney Murphy's second question: whether, under an exception to § 1-84b (b), a former long-standing designee may be employed by CI as its executive director within the one-year period set forth in that provision, provided that the pay level is no greater than the individual was receiving at his or her employing state agency. (It is assumed for purposes of this question that the former designee has left his or her employing state agency; otherwise he or she would still be a state employee, and the revolving-door provisions would not apply.)

The exception at issue was created in response to Advisory Opinion No. 89-25. There, the issue was whether it was permissible for a former state employee to return to his or her former agency on a contractual basis within one year of leaving state service. The former Commission noted that the one-year ban in § 1-84b (b) prevents a former state employee from representing "anyone"—including oneself—other than the state before his or her former agency. It then observed that "[i]n order for the former employee to apply for and accept a consulting or other contract with the former state agency/employer, he or she must necessarily contact the agency and reveal his or her identity." Given the absence of an exception for "representation of oneself," it concluded that § 1-84b (b) prohibits a former employee from personally contacting his or her former agency within one year of leaving state service.

A month later, the former Commission issued Advisory Opinion No. 89-25 (Amended) in response to concerns expressed by several state agencies that the previous opinion would hinder the state's ability to carry out its essential functions (particularly in light of a contemporaneous spate of retirements). Convinced that a "limited" regulatory exception to § 1-84b (b) was appropriate in this situation, the former Commission expressed its intent to issue a regulation allowing "a former state official or employee to have personal contact with his or her former agency within one year after leaving state service for the purpose of being reemployed (as either a state employee or an independent contractor) by that agency." There was one caveat: "that the reemployment be at no greater pay level than the individual was receiving at the time of separation from state service, plus necessary expenses if the work is performed as an independent contractor."

As is apparent from Advisory Opinion No. 89-25 (Amended), this exception contemplates an individual appearing before his or her former agency "for the purpose of being *reemployed* . . . ." (Emphasis added.) See also Advisory Opinion No. 90-30 (noting that the exception's intent was "to allow an individual to be *reemployed* within the one year time frame as an independent contractor or consultant" [emphasis added]); Advisory Opinion No. 98-21 (discussing the "*reemployment* policy" sanctioned by the former Commission). And the word "reemploy" assumes a prior employment relationship—something that would not have existed between CI and a former designee of an ex-officio member of the CI Board. That is, for example, a former designee of the Secretary of OPM (an ex-officio member of the CI Board) would have had an employment relationship with OPM, not with CI.

Thus, we are essentially being asked to extend this exception to a situation that is distinguishable from existing precedents. We decline to do so. This exception is, in the words of the former Commission, a "limited" one, in derogation of the cooling-off rationale underlying § 1-84b (b). So as not to further erode the effect of the general prohibition of § 1-84b (b), we conclude that a former long-standing designee may not, within the one-year period set forth in § 1-84b (b), appear before CI for the purpose of being employed.

III

Although not asked, the following question should be addressed: What if, for instance, a long-standing designee of the Secretary of OPM ceases serving as a designee to the CI Board, but remains a state employee at OPM, and then seeks to be hired by the Board as CI's executive director? Because he or she would still be considered a state employee at OPM, the Code's revolving-door provisions would not apply, even though he or she would essentially be appearing before a former agency, namely, CI.

In that case—that is, where a former long-standing designee who remains a state employee seeks to be hired by the very board on which he or she served—the relevant provision is General Statutes § 1-84 (c), the Code's use-of-office provision. Under that provision, a sufficient amount of time must pass, we believe, to suggest that a former long-standing designee did not even inadvertently use his or her office or influence while on the Board to secure the position in question. We therefore adopt a one-year cooling-off period, identical to that in § 1-84b (b), and conclude as follows: A former long-standing designee who remains at his or her employing state agency may not seek employment as CI's executive director for one year from the date he or she ceases to be a designee to the CI Board. To conclude otherwise would result in an absurdity; for example, permitting a former long-standing designee who *remains* at OPM to seek employment as CI's executive director within the one-year period, but prohibiting a former long-standing designee who *leaves* OPM (thus triggering the revolving-door provisions) from then seeking such employment within that same period.

CONCLUSION

It is the opinion of the Citizen's Ethics Advisory Board that:

1. Long-standing designees of ex-officio members of the CI Board will be considered to have "served" in the quasi-public agency for purposes of applying the one-year ban in § 1-84b (b).

2. A former long-standing designee (who has left his or her employing state agency) may not, within the one-year period set forth in § 1-84b (b), appear before CI for the purpose of being employed.

3. A former long-standing designee who remains at his or her employing state agency may not seek employment as CI's executive director for one year from the date he or she ceases to be a designee to the CI Board.